

Before the  
UNITED STATES COPYRIGHT OFFICE  
LIBRARY OF CONGRESS  
Washington, D.C.

GENERAL COUNSEL  
OF COPYRIGHT

DEC 29 1997

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In the Matter of:

Mechanical and Digital  
Phonorecord Delivery  
Rate Adjustment Proceeding

Docket No. 96-4 CARP DPRA

COMMENTS OF BROADCAST MUSIC, INC.

On December 1, 1997, the Copyright Office (the "Office") issued a notice of proposed rulemaking in the above-captioned proceeding (the "Notice"). The Office stated that it would adopt the rates, and regulations implementing these rates, proposed in a joint petition submitted by the Recording Industry Association of America, the National Music Publishers' Association, Inc. ("NMPA") and the Songwriters Guild of America (the "Joint Petition") if no comments or Notices of Intent to Participate are received by the close of business on December 29, 1997. In accordance with the Notice, Broadcast Music, Inc. ("BMI") hereby files its comments on the proposed rates and regulations.<sup>1</sup>

BMI is a music performing rights licensing organization that represents the public performing rights in a repertoire of over 3 million musical works owned or controlled by approximately 200,000 affiliated songwriters, composers and publishers, including the works of thousands of foreign societies that

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<sup>1</sup> Because BMI does not challenge the proposed rates, a Notice of Intent to Participate is not necessary and therefore is not herein filed.

license their works through BMI in the United States. Many of the publishers represented by BMI are members of the NMPA, and are therefore represented in this proceeding with regard to the mechanical compulsory license rate. However, the public performing rights of BMI's songwriters, composers and music publishers have not been represented in this proceeding. BMI's comments are intended to support and protect the public performing rights of its affiliates.

As the Notice indicates, this proceeding involves the first time rates have ever been set for digital phonorecord deliveries in accordance with the provisions of Section 115 of the Copyright Act of 1976, as amended by the Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No. 104-39, 109 Stat. 336 (the "DPRA"). In clear and express language, the DPRA provides that digital transmissions of musical works, which qualify for the Section 115 compulsory license because they meet the definition of "digital phonorecord delivery," may also constitute public performances under the terms of Section 106(4) of the Copyright Act:

A "digital phonorecord delivery" is each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.

Codified at 17 U.S.C. § 115(d).<sup>2</sup>

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<sup>2</sup> The legislative history of the DPRA is consistent with  
(continued...)

In view of the overlapping nature of the rights involved in digital transmissions of copyrighted musical works on the Internet (and other components of the global and national information infrastructures), if the Office adopts the proposed rates and regulations set forth in the Joint Petition, the Office should also clarify that the Section 115 compulsory license does not apply to any rights of public performance that may exist in the digital transmissions subject to the compulsory license.

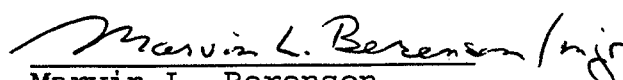
Although the courts have not yet expressly delineated the precise scope of the overlapping rights, BMI is nonetheless concerned that the public, and potentially the courts, may be misled by reading the Office's regulations regarding the compulsory mechanical license rates and terms for digital phonorecord deliveries if the regulations are not clear as to their inapplicability to the public performing right. Accordingly, BMI respectfully requests that Part 255 of the regulations be clarified to state that nothing therein affects the public performance right under 17 U.S.C. § 106(4). Further, proposed Section 255.6(b) creates the concept of a "Transient Phonorecord" for which no royalty is due. This section may leave the misimpression that performances of music, via the Internet, or in other contexts where a transient copy is made to facilitate performances, require no copyright license. Finally, the rules

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<sup>2</sup>(...continued)  
the express statutory text. See H.R. Rep. 274, 104th Cong. 1st Sess., at 28 (1995) (stating that "[d]igital phonorecord delivery, as defined in § 115(d), may also constitute a public performance . . .").

make certain promotional activities and uses of only a portion of a sound recording exempt from the payment of a mechanical royalty. Again, a clarification should be made that such an exemption does not apply to the public performance that also occurs.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Marvin L. Berenson /njr", is written over the typed name.

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